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No. 84-1529

In the Supreme Court of the United States

OCTOBER TERM, 1985

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

AMERICAN HOSPITAL ASSOCIATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, prohibits a hospital program receiving federal financial assistance from withholding nourishment or medically indicated treatment from a handicapped infant, or otherwise discriminating against the infant, solely because of his handicap.

PARTIES TO THE PROCEEDING

The petitioner is Margaret M. Heckler, the Secretary of Health and Human Services.

The respondents are the plaintiffs in two suits filed in the district court that were consolidated in that court and in the court of appeals. The plaintiffs in *American Hospital Association, et al.* v. *Heckler* are the American Hospital Association, the Hospital Association of New York State, and Strong Memorial Hospital of the University of Rochester. The plaintiffs in *American Medical Association, et al.* v. *Heckler* are the American Medical Association, the American Hospital Association, the Hospital Association of New York State, the American College of Obstetricians and Gynecologists, the Association of American Medical Colleges, the American Academy of Family Physicians, and Drs. Hubert A. Ritter, Peter A. M. Auld, Rita Gilman Harper, and Roy Howard Petrie.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The order of the court of appeals summarily affirming the judgment of the district court (Pet. App. 1a-3a) is unreported. The opinion of the court of appeals in *United States* v. *University Hospital* (Pet. App. 4a-47a), upon which both the district court and court of appeals relied in this case, is reported at 729 F.2d 144. The memorandum and order of the district court (Pet. App. 48a-49a) are reported at 585 F. Supp. 541.

JURISDICTION

The judgment of the court of appeals was entered on December 27, 1984. The petition for a writ of certiorari was filed on March 27, 1985 and was granted on June 17, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Sections 7(7) (B), 504, and 505(a)(2) of the Rehabilitation Act of 1973, 29 U.S.C. 706(7)(B), 794, and 794a(a)(2), are reproduced in an Appendix to this brief, *infra*, 1a-2a.

2. 45 C.F.R. 84.55 and Pt. 84, App. C, as added by 49 Fed. Reg. 1650-1654 (Jan. 12, 1984), are reproduced at Pet. App. 53a-72a and J. A. 111-126, and the preamble to the regulations (49 Fed. Reg. 1622-1649 (1984)) is reproduced at J. A. 11-111.

STATEMENT

A. The Statutory and Regulatory Framework

1. In April 1982, a newborn child with Down's Syndrome was permitted to starve to death in Bloomington, Indiana, after being denied life-saving surgery to repair a blocked esophagus.[1] Following disclosure of the incident, which generated widespread public discussion and concern, the President directed the Secretary of Health and Human Services (HHS) to remind health care providers receiving federal financial assistance that Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, prohibits discrimination on the basis of handicap in programs or activities that receive federal financial assistance. See 49 Fed. Reg. 1622-1623 (1984) (J.A. 14). On May 18, 1982, the Secretary sent such a notice to all covered health care providers, pointing out that then-existing HHS regulations (45 C.F.R. 84.52, 84.3 (j)) made clear that Section 504 applies to the provision of health services and that conditions such as Down's Syndrome are handicaps within the meaning of Section 504. 47 Fed. Reg. 26027 (J.A. 127-128).

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[1] In the Bloomington incident, "[the infant's] parents refused to consent to surgery[,] and the hospital turned to the state courts for guidance. Despite appointment of a guardian *ad litem* and several attempts at appeal, no judicial intervention occurred and the infant died six days later." *American Academy of Pediatrics* v. *Heckler*, 561 F. Supp. 395, 397 (D.D.C. 1983).

Subsequently, on March 7, 1983, the Department of Health and Human Services promulgated interim rules establishing certain procedures relating to the application of Section 504 to refusals to treat handicapped infants. 48 Fed. Reg. 9630. On April 14, 1983, those regulations were invalidated by the United States District Court for the District of Columbia. *American Academy of Pediatrics* v. *Heckler*, 561 F. Supp. 395. The district court in that case expressed the view that the broad language of Section 504 might well authorize some regulation of the furnishing of medical care to handicapped newborns. 561 F. Supp. at 402. However, the court concluded that HHS's decision to waive the public comment period when it promulgated the regulations violated the Administrative Procedure Act, 5 U.S.C. 553, and that the regulations were arbitrary and capricious because the administrative record failed to establish that several important factors had been adequately considered. 561 F. Supp. at 403-404.

2. HHS then published new proposed regulations on July 5, 1983. 48 Fed. Reg. 30846. After receiving broad public comment, HHS promulgated the regulations at issue here on January 12, 1984. 49 Fed. Reg. 1622 (J.A. 11). The 1984 regulations do not in themselves establish the applicability of Section 504 to the provision of health care to handicapped infants, because that applicability was "already established by the statute and the existing HHS regulations" (49 Fed. Reg. 1628 (J.A. 34)), which were promulgated in 1977 (42 Fed. Reg. 22677). HHS explained that those existing regulations expressly state that discrimination in the provision of health services to handicapped persons is prohibited by Section 504 (49 Fed. Reg. 1636 (J.A. 60), citing 45 C.F.R. 84.52), and that they define discrimination broadly to include the denial to a handicapped person of aid, benefits, or services equivalent to those afforded to others (48 Fed. Reg. 30847, citing 45 C.F.R. 84.4(b)(1)(i) and (ii)). Moreover, the Department stated that in 1980, it had enforced Section 504 against a hospital based on the hospital's withholding of surgery to correct an intestinal obstruction in a child with Down's syndrome. 48 Fed. Reg. 30847-30848. At the same time, HHS stressed

that Section 504 does not provide for "second guessing of reasonable medical judgments regarding medically beneficial care" (49 Fed. Reg. 1630 (J.A. 41)), but instead only embodies the principle that life and death medical treatment decisions must actually be based on such bona fide medical judgments, "not on stereotypes and prejudices against handicapped persons" (49 Fed. Reg. 1622 (J.A. 14)).

Against this background, the regulations at issue here contain two essential features: (a) guidelines setting forth HHS's interpretation of Section 504 in the particular context of a health care provider's failure to treat a handicapped infant, and (b) several procedural measures to implement that interpretation and bring about compliance:

a. *Interpretative Guidelines.* The regulations explain the application of Section 504 in this setting through interpretative guidelines that state four basic principles: (1) health care providers receiving federal financial assistance "may not, solely on the basis of present or anticipated physical or mental impairments of an infant, withhold treatment or nourishment from the infant who, in spite of such impairments, will medically benefit from the treatment or nourishment"; (2) "[f]utile treatment or treatment that will do no more than temporarily prolong the act of dying of a terminally ill infant is not considered treatment that will medically benefit the infant" for purposes of Section 504: (3) "[i]n determining whether certain possible treatments will be medically beneficial to an infant, reasonable medical judgments in selecting among alternative courses of treatment will be respected"; and (4) if a parent withholds consent to treatment that is medically indicated, the hospital may not, solely on the basis of the infant's handicap, decline to report a suspected instance of medical neglect to the appropriate child protective services agency or to seek judicial intervention on behalf of the child. 45 C.F.R. Pt. 84, App. C. para. (a)(1)-(4) (J.A. 121-122). The purpose of these guidelines is only to provide an analytical framework within which to address the issues presented. Accordingly, HHS stressed that they would be "flexibly" applied "on a case-by-case basis with a full appreciation of the facts presented" (49 Fed. Reg. 1632 (J.A. 46); see also *id.* at 1629 (J.A. 35)).

With regard to the last of the four principles, the Department explained that Section 504 applies to the federally assisted health care provider, not to parents, and that "section 504 does not mandate that the hospital unilaterally overrule the parental decision and provide treatment notwithstanding the lack of consent" (49 Fed. Reg. 1631 (J.A. 44)). However, HHS reported that "[h]ealth care professionals are generally required by state law to report cases of abuse, neglect, or other threats to a child's health" and that "[m]ost hospitals have established procedures to petition courts to order medical care when parents do not provide consent for treatment that is medically needed and appropriate"—"where, for example, parents have objected on religious grounds to a medically necessary blood transfusion for their child" (*ibid.* (J.A. 43-44)). Because "[t]he requirement that health care providers report instances of improper denial of medical care is no less a part of their program than is the provision of care itself," HHS concluded that Section 504 prohibits a hospital from discriminating on the basis of handicap in carrying out that responsibility (*ibid.*).[2]

b. *Procedural Provisions.* The remainder of the regulations set forth procedural measures for the implementation of these protections under Sections 504. These measures are tailored in a number of respects to foster a cooperative effort

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[2] The guidelines also give illustrations of treatment decisions that would and would not violate Section 504. They state that the withholding of medically beneficial surgery to correct an intestinal obstruction in an infant with Down's Syndrome, when the withholding is based upon the anticipated future mental retardation of the child and when there are no medical contraindications, would constitute discrimination in violation of Section 504. So, too, Section 504 would prohibit the withholding of treatment for medically correctable physical anomalies in children born with spina bifida if that withholding is based on the anticipated impairments of the child after the treatment, rather than on a bona fide medical judgment regarding the treatment itself. But the guidelines also state that the withholding of treatment for such conditions as anencephaly, spina bifida, and severe prematurity and low birth weight would not violate Section 504 if based on a reasonable medical judgment that the treatment would be futile or too unlikely of success given complications in the particular case, would create risks of potential harm to the infant, or would merely prolong the act of dying. 45 C.F.R. Pt. 84, App. C para. (a)(5)(i)-(iv) (J.A. 122-123).

on the part of the federal government, state governments, and the medical community.

i. The most detailed regulations outline voluntary steps hospitals could implement to carry out the principles of Section 504. Adoption of these steps could make the use of federal enforcement mechanisms unnecessary. In accordance with the recommendation of the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, as well as the comments of the American Academy of Pediatrics and the American Hospital Association (see 49 Fed. Reg. 1622, 1623-1625 (1984) (J.A. 13, 16-22)), the Secretary developed a model for hospitals that wish to establish an Infant Care Review Committee (ICRC) to assist in evaluating issues relating to the treatment of handicapped infants. 45 C.F.R. 84.55(a) and (f) (J.A. 112, 116-121).[3]

Under the proposed model, the ICRC would develop and recommend to the hospital various institutional policies concerning the withholding or withdrawal of treatment from infants with life-threatening conditions, including guidelines for management of certain categories of cases (*e.g.*, Down's Syndrome and spina bifida) and procedures to be followed in certain recurring circumstances (*e.g.*, brain death and parental refusal to consent to lifesaving treatment). 45 C.F.R. 84.55(f)(3)(i). The ICRC also would review specific cases in which a preliminary decision had been made to withhold or withdraw life-sustaining treatment from patients, such as where there was a disagreement between the treating physician and the family, and would recommend that the hospital refer the case to an appropriate court or child protective services agency if the Committee disagreed with the family's refusal to consent to treatment. 45 C.F.R. 84.55(f)(3)(ii). Finally, the Committee would conduct a retrospective record review of cases in which treatment had been withdrawn or

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[3] The ICRC would be composed of a practicing physician, a practicing nurse, a hospital administrator, a representative of the legal profession, a representative of a disability group or a disability expert, a lay community member, and a member of the hospital's organized medical staff, who would serve as chairman. 45 C.F.R. 84.55(f)(2).

withheld, in order to determine whether such instances were consistent with the hospital's policies. 45 C.F.R. 84.55(f)(1)(ii).[4]

ii. Consistent with the policy of involving the States in the cooperative effort as well, the regulations require each state child protective services agency that receives federal financial assistance to establish methods of administration and procedures to assure that it utilizes its full authority pursuant to state law to prevent unlawful medical neglect of handicapped infants. 45 C.F.R. 84.55(c) (J.A. 114-115). These provisions implement the state agencies' independent legal obligation under Section 504 to provide their protective services in a nondiscriminatory manner. "For those complaints that are expeditiously and effectively investigated and pursued by State agencies, the Secretary anticipates that additional federal efforts will often be unnecessary." 48 Fed. Reg. 30849 (1983).[5]

iii. The new regulations also make minor adjustments in HHS's preexisting procedures (see 45 C.F.R. Pt. 84) to address certain aspects of the investigation of complaints under Section 504 in this setting. Thus, the regulations provide for expedited access to records and facilities of the recipient hospital for investigative purposes when "necessary to pro-

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[4] In Section 124(b) of the Child Abuse Amendments of 1984, Pub. L. No. 98-457, 98 Stat. 1754, Congress similarly directed the Secretary to promulgate model guidelines to encourage the establishment of ICRCs within health care facilities. See page 44, *infra*. Those additional guidelines were promulgated by the Secretary on April 15, 1985. See 50 Fed. Reg. 14893.

[5] The methods and procedures must include a requirement that health care providers report instances of unlawful medical neglect of handicapped infants; provisions for the state agency to review and investigate such reports; procedures for affording child protective services to medically neglected handicapped infants, including, where appropriate, seeking a timely court order to compel the furnishing of necessary nourishment and medical treatment; and notification to HHS of each report of suspected medical neglect of an infant solely because of his handicap. 45 C.F.R. 84.55(c). The requirement that the state agency establish methods of administration and procedures to prevent discrimination was modeled after a similar requirement (see 45 C.F.R. 80.4(b)) applicable to state programs under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* 49 Fed. Reg. 1627 (J.A. 29).

tect the life or health of a handicapped individual." 45 C.F.R. 84.55(d) (J.A. 115). In addition, an appendix to the regulations sets forth guidelines for HHS investigations of reports of unlawful withholding of medical treatment. Those guidelines require consultation with the hospital's Infant Care Review Committee (if the hospital has one) and efforts to insure that investigations are conducted promptly and with the least disruption possible. 45 C.F.R. Pt. 84, App. C para. (b) (J.A. 123-126).

iv. Finally, the regulations require recipient hospitals to post an appropriate notice, visible to nurses and other medical professionals, that: (1) states that Section 504 prohibits the withholding of nourishment and medically beneficial treatment from handicapped infants based solely on their present or anticipated mental or physical impairments, and (2) identifies the designated hospital official, the appropriate child protective services agency, and the HHS office that may be contacted to obtain further information or to report suspected noncompliance. 45 C.F.R. 84.55(b) (J.A. 112-114).[6]

B. The Proceedings In This Case

1. On April 6, 1983, the American Hospital Association, the Hospital Association of New York State, and Strong

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In Section 122(3) of the Child Abuse Amendments of 1984 (98 Stat. 1752), Congress amended 42 U.S.C. 5103(b)(2) to require state child protective services agencies, as a condition to receiving funds under the Child Abuse Prevention and Treatment Act, 42 U.S.C. 5101 *et seq.*, to have similar procedures in place to respond to instances of withholding of medically indicated treatment from disabled infants who have life-threatening conditions. See page 44, *infra*. HHS promulgated regulations to implement this provision on April 15, 1985. See 50 Fed. Reg. 14878. In doing so, HHS stated that if the Secretary's interpretation of Section 504 is sustained by this Court, she will take steps to forge an "effective interrelationship" between the regulations under Section 504 and those under the Child Abuse Amendments. See 50 Fed. Reg. 14885 (1985).

[6] HHS explained that the posting of notices is a "time honored and reasonable method for providing notice to concerned individuals with respect to civil rights protections now utilized under a variety of programs" (48 Fed. Reg. 30850 (1983)). HHS modified its original proposal to reduce the minimum size of the notice (to 5 x 7 inches) and to provide that it need not be visible to the public (49 Fed. Reg. 1625-1626 (J.A. 23-27)).

Memorial Hospital filed suit in the United States District Court for the Southern District of New York challenging the initial regulations that had been promulgated by the Secretary on March 7, 1983. See page 3, *supra*. The district court entered a temporary restraining order barring enforcement of those regulations in New York State. *American Hospital Ass'n* v. *Heckler*, No. 83 Civ. 2638-CLB (S.D.N.Y. Apr. 6, 1983). However, before the court could hold a hearing, the United States District Court for the District of Columbia declared the regulations invalid on APA grounds. See *American Academy of Pediatrics* v. *Heckler*, discussed at page 3, *supra*. On March 12, 1984, after the Secretary promulgated the new regulations at issue here, the plaintiffs filed an amended complaint challenging those regulations as beyond the Secretary's authority under Section 504 (J.A. 2, 151-159). On the same date, a second suit was filed by the American Medical Association, the American Hospital Association, and others challenging the same regulations (J.A. 5, 129-150). The two suits were consolidated in the district court.

The district court thereafter held that the regulations are beyond the Secretary's statutory authority under Section 504 (Pet. App. 48a-49a), concluding that this case was controlled by the Second Circuit's decision in *United States* v. *University Hospital*, 729 F. 2d 144 (1984) (Pet. App. 4a-47a), discussed at pages 9-11, *infra*. The district court's final judgment permanently enjoins the Secretary from any further implementation of the regulations and from taking any other action under Section 504 to investigate or regulate treatment decisions involving impaired newborn infants in any program receiving federal financial assistance (Pet. App. 50a-52a).

The court of appeals summarily affirmed the district court's judgment on the basis of the court of appeals' prior decision in *University Hospital* (Pet. App. 1a-3a).

2. a. In *University Hospital*, which both the district court and court of appeals regarded as controlling in this case, a divided panel of the Second Circuit held that Section 504 is wholly inapplicable to the withholding of medical treatment from handicapped infants. The court therefore ruled that the government was not entitled under HHS's general

Section 504 regulations (45 C.F.R. 80.6(c), 84.61) to review the hospital's records in order to investigate alleged noncompliance with Section 504 in connection with the withholding of treatment from a particular handicapped infant, Baby Jane Doe.

The court of appeals in *University Hospital* assumed, without deciding, that the hospital's receipt of Medicare and Medicaid funds constituted the receipt of "Federal financial assistance" that triggered the application of Section 504 (Pet. App. 16a-18a), and it found that Baby Jane Doe was a "handicapped individual" for purposes of Section 504 (*id.* at 26a-28a). But the majority held that Baby Jane Doe was neither "otherwise qualified" for the hospital's services nor "subjected to discrimination" within the meaning of Section 504 (*id.* at 28a-39a). It believed that "the phrase 'otherwise qualified' is geared toward relatively static programs or activities such as education, employment, and transportation systems" (Pet. App. 30a (citations omitted)). "As a result," the court reasoned, "the phrase cannot be applied in the comparatively fluid context of medical treatment decisions without distorting its plain meaning" (*ibid.*). Nor, in the court's view, could the child be considered to be "subjected to discrimination," because "[w]here the handicapping condition is related to the condition(s) to be treated, it will rarely, if ever, be possible to say with certainty that a particular decision was 'discriminatory' " (*ibid.*).

The court of appeals acknowledged that Congress intended Section 504 to apply to the delivery of "health services" (Pet. App. 33a-35a, quoting S. Rep. 93-1297, 93d Cong., 2d Sess. 38 (1974)). But in its view that intent was not controlling because the legislative history did not contain a specific reference to medical treatment decisions (Pet. App. 31a-38a). The court also acknowledged that HHS's implementing regulations promulgated in 1977 likewise apply to the delivery of health services and that those regulations specifically state that Section 504 prohibits a health care provider from refusing to treat a person because of his handicap (*id.* at 19a-20a, citing 45 C.F.R. 84.52 and Pt. 84, App. A para. 36). But the court nevertheless declined to attach significant weight to the Secretary's interpretation of Section

504 because, in its view, the regulatory history was "inconclusive" (*id.* at 25a; see generally *id.* at 18a-25a). Finally, the court believed that to require a hospital to petition a state court or to take other steps where the parents have withheld consent to necessary treatment for a handicapped infant would impose an impermissible "affirmative action" burden on the hospital (*id.* at 39a).

b. Judge Winter dissented (Pet. App. 42a-47a). He concluded that because Congress explicitly patterned Section 504 after Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, which prohibits discrimination on the basis of race in federally assisted programs, Congress had determined that, "so far as the administration of federal financial assistance is concerned, discrimination on the basis of a handicap should be on statutory par with discrimination on the basis of race" (Pet. App. 43a-44a). Judge Winter stressed that the government has never taken the position that it is entitled to override a medical judgment; "[i]ts position rather is that it is entitled under Section 504 to inquire whether a judgment in question is a *bona fide* medical judgment" (*id.* at 44a). Based on the statutorily mandated analogy to racial discrimination, Judge Winter found the logic of the government's position to be "about as flawless as a legal argument can be" (*ibid.*):

> A judgment not to perform certain surgery because a person is black is not a *bona fide* medical judgment. So, too, a decision not to correct a life threatening digestive problem because an infant has Down's Syndrome is not a *bona fide* medical judgment. The issue of parental authority is also quickly disposed of. A denial of medical treatment to an infant because the infant is black is not legitimated by parental consent. Finally, once the legislative analogy to race is acknowledged, the intrusion on state authority becomes insignificant.

SUMMARY OF ARGUMENT

A. Section 504 of the Rehabilitation Act of 1973 provides that "[n]o otherwise qualified handicapped individual * * * shall, solely by reason of his handicap, * * * be denied

the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance * * * ." This language, which is patterned after Title VI of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972, clearly prohibits the withholding of nourishment or necessary medical treatment from a handicapped infant, solely by reason of his handicap, in a federally assisted health services program.

The court of appeals acknowledged that a physically or mentally impaired infant is a "handicapped individual" within the meaning of Section 504. That term is defined broadly to include "*any* person"—without limitation based on the person's age—who has a physical or mental impairment that "substantially limits one or more of such person's major life activities" or who is "regarded as having such an impairment." 29 U.S.C. 706(7) (B). The infants who are the subject of the regulations and interpretative guidelines promulgated by the Secretary in 1984 have impairments that substantially limit their major life activities and are regarded by others as having such impairments. Section 504 likewise applies to "*any* program" that receives federal financial assistance, a phrase that plainly encompasses programs for the delivery of health services. When Congress intended exceptions to the coverage of Section 504—or to the coverage of the parallel prohibitions in Title VI and Title IX—it expressly so provided. The absence of any such exception in Section 504 for health care programs or for handicapped infants in such programs reinforces the conclusion that Section 504 applies in this setting.

There also is no basis for excluding the infants involved from the protection of Section 504 on the ground that they are not "otherwise qualified" to receive treatment from any federally assisted health services program. If a hospital would, as a general matter, treat the malady from which the handicapped infant suffers and is able to do so, the infant is "otherwise qualified" to receive services from that provider.

The only additional condition a hospital ordinarily would impose on the furnishing of such treatment is that the treatment be medically indicated in the circumstances of the particular patient's condition. But if an infant's handicapping

condition (*e.g.*, Down's Syndrome) would not prevent him from benefiting from a particular course of treatment (*e.g.*, surgery to repair a blocked esophagus), the infant has satisfied this requirement as well and therefore is "otherwise qualified" for the specific treatment. If, in those circumstances, a hospital nevertheless refused to furnish the treatment to a handicapped infant, even though it would furnish the treatment to a nonhandicapped child, the infant has, "solely by reason of his handicap," been "denied the benefits of" and been "subjected to discrimination under" the federally assisted program. Similarly, where the parents have withheld their consent to medically indicated treatment, if the hospital refused to notify the state child protective services agency or to petition a court for an order directing the treatment—even though the hospital would take such measures in the case of a nonhandicapped child—the handicapped infant has been denied the benefits of and been subjected to discrimination under the hospital's federally assisted program.

B. Each stage of the legislative history and administrative implementation of Section 504 firmly supports the plain meaning of the statutory text. As an initial matter, because Section 504 was patterned after Title VI of the Civil Rights Act of 1964, it is significant that one of the principal areas in which Title VI was intended to prevent discrimination was in the delivery of adequate health services, including those furnished to infants. Although there were only limited debates on Section 504 itself when it was enacted in 1973, the statements by its sponsors, Senator Humphrey and Representative Vanik, emphasized that handicapped infants have a right to live and to receive health care.

In 1974, Congress amended the definition of the term "handicapped individual" to assure that Section 504 would be given a broad coverage. The legislative history of those amendments makes clear that Congress intended Section 504 to apply to health services programs, that discrimination on the basis of handicap is to be regarded as similar to discrimination on the basis of race (which indisputably would be an impermissible ground on which to deny necessary medical treatment to an infant), and that the Secretary would promulgate regulations to implement Section 504. It is

significant as well that in 1974, Congress expanded the coverage of another statutory provision that specifically prohibits discrimination in admissions and treatment by federally assisted hospitals on the basis of one type of handicap (alcoholism). See 42 U.S.C. (Supp. I) 290dd-2(a). In so doing, Congress expressly rejected the position of respondent American Hospital Association that such matters should be left exclusively to medical professionals and that there is no role for federal law in prohibiting discrimination in the furnishing of medical treatment under federally assisted programs.

Consistent with this background, the comprehensive regulations promulgated by the Secretary in 1977 made clear that Section 504 applies to federally assisted health services programs and prohibits a provider of such services from refusing to treat a person's medical condition solely because the person has a handicap. The Secretary recognized that in this respect Section 504 is consistent with the statutes that already prohibited a federally assisted hospital from discriminating against alcoholics and drug addicts in admissions and treatment. Congress in turn ratified this interpretation of Section 504 when it again amended the Rehabilitation Act in 1978. The 1984 regulations and interpretative guidelines merely elaborate upon and implement those established principles in the particular context of the withholding of necessary medical care from a handicapped infant.

ARGUMENT

SECTION 504 OF THE REHABILITATION ACT OF 1973 PROHIBITS THE WITHHOLDING OF NOURISHMENT OR MEDICALLY BENEFICIAL TREATMENT FROM A HANDICAPPED INFANT, SOLELY BECAUSE OF HIS HANDICAP, IN ANY PROGRAM OR ACTIVITY RECEIVING FEDERAL FINANCIAL ASSISTANCE

Section 504 of the Rehabilitation Act of 1973 mandates a "broad government policy that programs receiving Federal

financial assistance shall be operated without discrimination on the basis of handicap." S. Rep. 93-1297, 93d Cong., 2d Sess. 39 (1974). It was enacted to prevent discrimination against "all handicapped individuals" under "any" federally assisted program, specifically including those providing for the delivery of "health services" (*id.* at 38). Consistent with this congressional intent, the comprehensive regulations promulgated by the Secretary in 1977 made clear that Section 504 applies to federally assisted health care programs and that it prohibits a provider from refusing to treat a handicapped person solely because of his handicap. The additional regulations and interpretative guidelines promulgated by the Secretary in 1984, which are at issue in this case, merely elaborate upon and implement that settled administrative interpretation in the particular context of a health care provider's withholding of nourishment or medically beneficial treatment from a handicapped infant solely because of his handicap.

The Secretary stressed that the interpretative guidelines contained in the 1984 regulations were intended to be flexible and that the actual application of Section 504 in this setting would have to be addressed on a case-by-case basis, with a sensitive regard for the circumstances presented. The court of appeals has now foreclosed that process by invalidating the regulations and interpretative guidelines on their face and issuing a nationwide injunction, without waiting for the Secretary to consider their application in the circumstances of any particular instance of the withholding of medical care. The court's premise was that Section 504 does not apply to this entire category of cases, no matter what the circumstances. Thus, to use one of the specific examples cited in the interpretative guidelines (see note 2, *supra*), Section 504 does not, in the court of appeals' view, prohibit a federally assisted hospital from withholding life-saving surgery to correct an intestinal obstruction in an infant with Down's Syndrome—even if the hospital would not hesitate to perform the same surgery for a normal child and the hospital's failure to perform the surgery is based solely upon the anticipated mental retardation of the infant and therefore solely upon his handicap.

The implied exception the court of appeals fashioned from the broad protections of Section 504 is contrary to the statute's text, legislative history, and consistent administrative interpretation. That exception also is contrary to the overriding purpose of Section 504 to assure "evenhanded treatment" of handicapped individuals and to afford them the opportunity "to participate in and benefit from programs receiving federal assistance." *Alexander* v. *Choate,* No. 83-727 (Jan. 9, 1985), slip op. 16.

The regulations and guidelines the court of appeals invalidated do not intrude the Secretary into complex medical judgments made by health care professionals. They embody a simple principle and impose a single duty: that a provider base its decision regarding whether or how to treat a handicapped infant on a bona fide medical judgment regarding the potential risks and benefits to the infant, and not on the mere fact that the infant is handicapped and may remain so after the treatment. When Congress enacted Title VI of the Civil Rights Act of 1964, it deemed a child's race, color, or national origin to be an impermissible basis on which to deny him needed medical treatment under a federally assisted program. In Section 504, Congress likewise deemed a child's handicap to be an impermissible basis on which to deny treatment, unless the handicap itself renders the treatment contraindicated as a medical matter. In concluding otherwise, the court of appeals has excluded from the coverage of Section 504 an entire category of individuals who—by reason of their infancy, their handicaps, and their life-threatening circumstances—are especially in need of its protection

A. THE LANGUAGE OF SECTION 504 CLEARLY PROHIBITS A FEDERALLY ASSISTED HOSPITAL FROM WITHHOLDING NOURISHMENT OR MEDICAL TREATMENT FROM A HANDICAPPED INFANT SOLELY BECAUSE OF HIS HANDICAP

The starting point of analysis of course must be the language of Section 504 itself, for " 'we assume "that the legislative purpose is expressed by the ordinary meaning of

the words used." ' " *Kosak* v. *United States,* No. 82-618 (Mar. 21, 1984), slip op. 5 (quoting *American Tobacco Co.* v. *Patterson,* 456 U.S. 63, 68 (1982), and *Richards* v. *United States,* 369 U.S. 1, 9 (1962)). See *Consolidated Rail Corp.* v. *Darrone,* No. 82-862 (Feb. 28, 1984), slip op. 7-9. Contrary to the court of appeals' view (Pet. App. 28a-31a), the language of the statutory prohibition clearly supports the established interpretation set forth in the 1977 regulations and elaborated upon in the 1984 regulations at issue here.

Section 504 provides in relevant part:

> No otherwise qualified handicapped individual in the United States * * * shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance * * *.

Before parsing this language, it is appropriate to recall the principles that govern its construction.

The language of Section 504 "cannot be read in isolation from its history and purposes." *Darrone,* slip op. 8 n.13. "Section 504 was patterned after, and is almost identical to, the antidiscrimination language of section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d-1 (relating to race, color, or national origin) and section 901 of the Education Amendments of 1972, 42 U.S.C. 1683 (relating to sex)." *Alexander* v. *Choate,* slip op. 5 n.7 (quoting S. Rep. 93-1297, *supra,* at 39). The first of these provisions, Title VI, is founded on the principle " 'that funds of the United States are not used to support racial discrimination' but 'are spent in accordance with the Constitution and the moral sense of the Nation.' " *Darrone,* slip op. 8 n.13 (quoting 110 Cong. Rec. 6544 (1964) (remarks of Sen. Humphrey)). The language Congress employed to state this principle of "[s]imple justice"[7] is "majestic in its sweep" (*Regents of the University of California* v. *Bakke,* 438 U.S. 265, 284 (1978) (opinion of Powell, J.)). And the Court observed with respect to the same language in Title

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[7] *Lau* v. *Nichols,* 414 U.S. 563, 569 (1974) (quoting 110 Cong. Rec. 6543 (1964) (remarks of Sen. Humphrey), and 109 Cong. Reg. 11161 (1963) (President Kennedy's Message to Congress)).

IX that " 'if we are to give [the statutory prohibition] the scope that its origins dictate, we must accord it a sweep as broad as its language.' " *North Haven Board of Education* v. *Bell*, 456 U.S. 512, 521 (1982) (quoting *United States* v. *Price*, 383 U.S. 787, 801 (1966)). The Court therefore has been "reluctant to read into [the statutory language] a limitation not apparent on its face." *Grove City College* v. *Bell*, No. 82-792 (Feb, 28, 1984), slip op. 8.

These principles also govern the construction of the parallel language in Section 504. See, *e.g.*, *Darrone*, slip op. 6-10 & n.13; *Alexander* v. *Choate*, slip op. 5 n.7. As we explain below, an analysis of each of the operative phrases in the statutory text demonstrates that a provider's withholding (in a federally assisted program or activity) of nourishment, medically beneficial treatment, or related assistance from a handicapped infant solely because of his handicap falls squarely within the scope of Section 504. This language should be given its plain meaning, consistent with the "national commitment to eliminate the 'glaring neglect' of the handicapped" (*Alexander* v. *Choate*, slip op. 8 (quoting 118 Cong. Rec. 526 (1972) (remarks of Sen. Percy)).

1. "Handicapped Individual"

The court of appeals in *University Hospital* correctly recognized that an impaired newborn child is a "handicapped individual" for purposes of Section 504. See Pet. App. 26a-28a. The directive that "[n]o * * * handicapped individual" be subjected to discrimination manifests in itself an intent to give the statute an all-inclusive coverage, without regard to the individual's age. Compare *North Haven*, 456 U.S. at 520. See *Smith* v. *Robinson*, No. 82-2120 (July 5, 1984), slip op. 23 ("§504 protects handicapped persons of all ages"). Moreover, the term "handicapped individual" is defined in broad terms to mean "*any person* who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment." 29 U.S.C. 706(7)(B) (emphasis added). There can be no doubt that the infants who are the subject of the concern that gave rise to the 1984 regulations have "physical

or mental impairment[s]" within the meaning of clause (i) of this definition (see 45 C.F.R. 84.3(j)(2)(i)), and it is equally clear that those impairments substantially limit one or more of the infants' "major life activities" within the meaning of clause (i).[8] In addition, as the court of appeals observed (Pet. App. 27a), "it would defy common sense" to rule that the Baby Jane Doe involved in *University Hospital* was not at least "regarded" by others as having such an impairment, and thus handicapped within the meaning of clause (iii) of the statutory definition. See 45 C.F.R. 84.3(j)(2)(iv).

It also is significant that Congress expressly excluded one category of individuals from the statutory definition of the term "handicapped individual" quoted above. See 29 U.S.C. 706(7)(B) (excluding certain alcoholics and drug abusers), discussed at pages 42-43, *infra*. The absence of a similar exclusion for handicapped infants, either in general or in the specific context of the delivery of health services, further supports the conclusion that they are protected by the Act. *North Haven*, 456 U.S. at 521-522. Compare *Sure-Tan, Inc.* v. *NLRB*, No. 82-945 (June 25, 1984), slip op. 6-7.

2. "Program or Activity Receiving Federal Financial Assistance"

The language of Section 504 likewise does not suggest any exception that would permit discrimination against handicapped individuals under those federally assisted programs that furnish medical treatment, as distinguished, for example, from programs in the areas of employment or education. See *Alexander* v. *Choate*, *supra*. Section 504 contains no such "limiting language; rather, that section prohibits discrimination against the handicapped under '*any* program

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[8] HHS's general Section 504 regulations define the term "major life activities" to mean "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 45 C.F.R. 84.3(j)(2)(ii). Although newborn infants cannot perform some of these functions, others of those mentioned (*e.g.*, seeing, hearing, breathing and learning) are capable of being performed by infants. Moreover, this listing expressly is not exclusive (it refers to functions "such as" those listed), and it therefore readily embraces any functions or activities that are comparably "major" in the life of an infant.

or activity receiving Federal financial assistance.' " *Darrone*, slip op. 7 (emphasis added by the Court).[9]

By contrast, in Title IX of the Education Amendments of 1972, Congress included a number of exceptions for circumstances in which it chose not to insist that the institution refrain from basing decisions specifically on the otherwise prohibited factor of the sex of the individual. 29 U.S.C. 1981(a)(1)-(9). See *North Haven*, 456 U.S. at 514-515 n.1, 521-522; see also 42 U.S.C. 2000d-3. Because Section 504 was patterned after Title IX and was enacted only a year later, the fact that Congress did not include any similar exceptions in Section 504 further reinforces the conclusion that Congress did not intend to leave federally assisted hospitals free to deny medically necessary treatment solely on the basis of the statutorily prohibited factor of the individual's handicap.

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[9] No question is presented in this case with regard to either the types of payments to a hospital that constitute federal financial assistance or the scope of the "program or activity" receiving such assistance. Compare *Darrone*, slip op. 11-12; *North Haven*, 456 U.S. at 540. The district court in *University Hospital* held that the hospital's receipt of payments for the furnishing of medical treatment under the Medicaid and Medicare Programs (42 U.S.C. (& Supp. I) 1395 *et seq.*; 42 U.S.C. 1396 *et seq.*) constituted the receipt of "Federal financial assistance" that triggered the application of Section 504, and that Section 504 applied whether or not Baby Jane Doe herself was a beneficiary under either program. *United States* v. *University Hospital*, 575 F. Supp. 607, 612-613 (E.D. N.Y. 1983). Compare *Grove City*, slip op. 15 n.21. This holding is consistent with HHS's longstanding position (see 45 C.F.R. Pt. 84, App. A paras. 1 and 2) and with the only court of appeals decision that has extensively considered the evidence of congressional intent. See *United States* v. *Baylor University Medical Center*, 736 F.2d 1039, 1042-1049 (5th Cir. 1984), cert. denied, No. 84-525 (Jan. 21, 1985).

The court of appeals in *University Hospital* declined to resolve this question. It assumed for purposes of its decision that the hospital's actions pertaining to Baby Jane Doe were under a program or activity receiving federal financial assistance by virtue of the hospital's receipt of Medicare and Medicaid funds (Pet. App. 16a-18a), but it held that Section 504 does not in any event address the question of discrimination in the medical treatment of handicapped infants (*id.* at 18a-41a). The district court and court of appeals in the instant case entered judgment in favor of respondents on the basis of that holding in *University Hospital* (*id.* at 2a-3a, 50a-51a), and they therefore likewise had no occasion to consider whether Medicare or Medicaid payments constitute "Federal financial assistance" and, if so, what the scope of the assisted "program or activity" should be.

3. "Otherwise Qualified"

Nor is there any basis for excluding the entire category of handicapped infants from the coverage of Section 504 on the ground that they are not "otherwise qualified" to receive nourishment and medically indicated treatment under federally assisted health care programs. This Court stated in *Southeastern Community College* v. *Davis*, 442 U.S. 397, 406 (1979), that the plain meaning of the term "otherwise qualified handicapped individual" as used in Section 504 is "one who is able to meet all of a program's requirements in spite of his handicap." The Court's reasoning in that case further supports the interpretation of Section 504 set forth in the Secretary's 1984 regulations.

a. In *Davis*, a deaf person was unable to meet the generally applicable physical requirements for admission to the community college's associate degree nursing program because the ability to understand speech without reliance on lipreading was necessary for patient safety during the clinical phase of the program. 442 U.S. at 401-402, 407, 409-410, 413 n.12. See *Alexander* v. *Choate*, slip op. 12-13. The Court noted that substantial modifications of the college's nursing program would have been required in order to accommodate the limitations imposed by the applicant's hearing impairment, and it held that there "was no violation of § 504 when [the college] concluded that [she] did not qualify for admission to its program." 442 U.S. at 414. The Court explained that "[n]othing in the language or history of § 504 reflects an intention to limit the freedom of an educational institution to require reasonable physical qualifications for admission to [its] program" (442 U.S. at 414), but it made clear at the same time that "mere possession of a handicap is not a permissible

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In any event, the regulations and interpretative guidelines respondents challenge in this suit (45 C.F.R. 84.55 and Pt. 84, App. C) do not address the question of what constitutes a program or activity receiving federal financial assistance for purposes of Section 504; they simply set forth a hospital's duties where it has such a program or activity. The question of coverage therefore can appropriately be addressed only in the context of the application of Section 504 to a particular hospital. The governing legal standard is, of course, that described and applied by this Court in *Grove City*, slip op. 14-17.

ground for assuming an inability to function in a particular context" (*id.* at 405).

Davis establishes that whether a handicapped person is "otherwise qualified" must be determined by reference to the reasonable and bona fide standards and qualifications of general applicability that serve the operational needs of the particular federally assisted program or activity. That interpretation is strongly supported by the legislative history[10] and is embodied in the regulations promulgated by the Secretary in 1977, as this Court recognized in *Davis* (see 442 U.S. at 406, quoting 45 C.F.R. 84.3(k)(3); see also 45 C.F.R. 84.3(k)(1)-(5) and Pt. 84, App. A para. 5). In the context of a program furnishing health services, for example, the 1977 regulations state that a qualified handicapped person is "a handicapped person who meets the essential eligibility requirements for the receipt of such services." 45 C.F.R. 84.3(k)(4).

There has been no suggestion in this case that the handicapped infants who are the subject of the regulations and guidelines promulgated in 1984 categorically fail to satisfy the generally applicable eligibility requirements of all federally assisted hospitals and that no such infant therefore is "otherwise qualified" to receive the benefits of the medical services furnished by any federally assisted hospital. Such an

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[10] As this Court observed in *Alexander* v. *Choate* (slip op. 7-8 n.13), Section 504 had its origins in companion bills introduced by Representative Vanik and Senators Humphrey and Percy in the 92d Congress. H.R. 12154, 92d Cong., 1st Sess., 117 Cong. Rec. 45945 (1971); S. 3044, 92d Cong., 2d Sess., 118 Cong. Rec. 525-526 (1972). Those bills would have amended Title VI to bar discrimination against a person on the basis of a handicap "unless lack of such physical or mental handicap is a bona fide qualification reasonably necessary to the normal operation of such program or activity." 118 Cong. Rec. 526 (1972). See also *id.* at 2999 (remarks of Rep. Vanik). Section 504 embodies the intent of this predecessor bill. *Alexander* v. *Choate*, slip op. 8 n.15; see 119 Cong. Rec. 6145 (1973) (remarks of Sen. Humphrey); *id.* at 7114 (remarks of Rep. Vanik). The phrase "otherwise qualified" in Section 504 therefore should be understood to refer to a qualification reasonably necessary to the operation of the federally assisted program. See also 124 Cong. Rec. 30322-30325 (1978) (debate on 1978 amendment to 29 U.S.C. 706(7), discussed at pages 42-43, *infra*); 124 Cong. Rec. 37509-37510 (remarks of Sen. Williams).

assertion would be untenable. To be sure, there are some special purpose hospitals or other providers that do not treat certain categories of patients or types of conditions. Section 504 would not require such a provider to treat an infant, simply because he is handicapped, for a condition the provider otherwise would not treat under a bona fide policy of this kind. See page 40, *infra;* compare *Alexander* v. *Choate,* slip op. 14-21. But that limited rationale plainly has no application to a general hospital or other provider that does admit and treat patients with the types of conditions for which the handicapped infant requires attention. Indeed, the question whether a handicapped infant is "otherwise qualified" to receive medical services within the meaning of Section 504 typically arises with respect to infants who already are patients in a hospital.

b. Of course, even where a hospital or other provider does afford a particular type of treatment as a general matter, a further condition typically imposed on the ability of any given person to receive that treatment is that it be medically indicated in his particular cirumstances. A hospital ordinarily does not perform surgery or afford other treatment to any patient, handicapped or not, if he will not benefit medically from it. Nothing in Section 504 requires a hospital to abandon that neutral principle in the case of handicapped infants. But if the limitations stemming from the infant's handicapping condition (*e.g.,* Down's Syndrome) would not prevent him from benefiting from a particular course of treatment (*e.g.,* corrective surgery to repair a blocked esophagus), the infant has satisfied this requirement as well.[11] He therefore must be deemed "otherwise qualified" to receive the treatment. Cf. *Davis,* 442 U.S. at 401-402, 409-410: *Alexander* v. *Choate,* slip op. 12-13.

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[11] Cf. 42 U.S.C. (Supp. I) 1395y(a)(1)(A) (payments may be made under the Medicare Program for services that are "reasonable and necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member"); 42 U.S.C. 1396 (Medicaid appropriations are authorized for "necessary medical services" and for "rehabilitation and other services to help families and individuals attain or retain capability for independence or self-care"); *Beal* v. *Doe,* 432 U.S. 438, 445-446 (1977).

The interpretative guidelines promulgated by the Secretary in 1984 are based on this construction of the term "otherwise qualified."[12] Those guidelines state that with respect to programs or activities receiving federal financial assistance, "health care providers may not, solely on the basis of present or anticipated physical or mental impairments of an infant, withhold treatment or nourishment from the infant who, in spite of such impairments, will medically benefit from the treatment or nourishment." 45 C.F.R. Pt. 84, App. C para. (a)(1) (J.A. 122).[13] A denial of treatment in those circumstances would be based precisely on the existence of the infant's handicap, standing alone, not on the fact that the handicapping condition results in limitations or has other manifestations which in turn cause the individual to fail to meet bona fide qualifications established under the federally assisted program, as in *Davis*. This Court made clear in *Davis* that "mere possession of a handicap is not a permissible ground for assuming an inability to function in a particular context." 442 U.S. at 405. So, too, mere possession of a handicap – as distinguished from any consequences of the handicapping condition that render medical treatment contraindicated – is not a permissible ground for assuming that an infant is unable to benefit medically from treatment. That rationale would relegitimize the very "societal neglect" of handicapped persons that Congress sought to eliminate through the passage of Section 504. See *Alexander* v. *Choate*, slip op. 8 (quoting 119 Cong. Rec. 5883 (1973) (remarks of Sen. Cranston)).

c. The court of appeals majority in *University Hospital* did not appear to take issue with the general proposition that the term "otherwise qualified" in Section 504 refers to

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[12] See 49 Fed. Reg. 1636 (J.A. 60):

> If the handicapped person is able to benefit medically from the treatment or service, in spite of the person's handicap, the individual is "otherwise qualified" to receive that treatment or service, and it may not be denied solely on the basis of the handicap.

[13] "Futile treatment or treatment that will do no more than temporarily prolong the act of dying of a terminally ill infant is not considered treatment that will medically benefit the infant." *Id.* para. (a)(2) (J.A. 122).

reasonable and neutral standards of eligibility under the particular program and that a person's handicapping condition ordinarily may be the basis for denying him the benefits of that program only if its effects or manifestations render him unqualified under such standards. See Pet. App. 28a-30a.[14] But the court of appeals found that proposition inapplicable in the present setting. It believed that the term "otherwise qualified" is "geared toward relatively static programs or activities such as education, employment, and transportation systems," and cannot readily be applied in what the court labeled the "comparatively fluid context" of medical treatment decisions without "distorting its plain meaning" (Pet. App. 30a). It is the majority in *University Hospital* that distorted the plain meaning of Section 504, because the proffered distinction between "static" and "fluid" contexts finds no support whatever in the statutory language. That distinction is just another way of arguing that discrimination in programs for the delivery of medical care should be excluded from the coverage of Section 504. As we have shown, however, Section 504 broadly prohibits discrimination in "*any* program or activity receiving Federal financial assistance" (emphasis added); see *Darrone*, slip op. 7.

By its use of the term "fluid," the court of appeals apparently had in mind that a handicapped infant's need for medical treatment may vary with changes in the child's physical condition. But that factor is not in itself logically determinative of whether at any given time an individual is "qualified" for a particular medical procedure or course of treatment. Indeed, in some circumstances, it may simply underscore his pressing need for treatment. Insofar as the term "otherwise qualified" is concerned, the guiding principle in all circumstances, fluid or not, is whether a particular course of treatment would be

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[14] The decisions upon which the court of appeals relied, in addition to this Court's decision in *Davis*, all endorse this view of the term "otherwise qualified" in Section 504. See *Dopico* v. *Goldschmidt*, 687 F.2d 644, 652-653 (2d Cir. 1982); *Doe* v. *New York University*, 666 F.2d 761, 775-776 (2d Cir. 1981); *Prewitt* v. *United States Postal Service*, 662 F.2d 292 (5th Cir. 1981); *Simon* v. *St. Louis County*, 656 F.2d 316, 320-321 (8th Cir. 1981), cert. denied, 455 U.S. 976 (1982).

medically beneficial for the child. That presumably is the sort of judgment that health care professionals are accustomed to making on behalf of all of their patients. Section 504 and the implementing regulations and guidelines at issue here simply require that those professionals also make such a medical judgment on behalf of their patients who are handicapped infants, and not rest their decisions and deny beneficial care on the basis of the bare presence of the infant's handicapping condition. Compare *Youngberg* v. *Romeo*, 457 U.S. 307, 323 (1982). Where the infant's condition is "fluid," that factor may justify additional deference to a physician's professional medical judgment in choosing among alternatives. But it does not render Section 504 wholly inapplicable.[15]

4. "Denied Benefits" or "Subjected to Discrimination" On the Basis of Handicap

Against the background of the foregoing discussion, the final element of the prohibition in Section 504—the element of discrimination—requires little discussion. If, in a federally assisted program, a hospital has refused to furnish an infant who has a handicap (*e.g.*, Down's Syndrome) with treatment that would be medically beneficial (*e.g.*, surgery to correct a blocked esophagus) and that would be performed for a child who is not handicapped, the infant quite clearly has, "solely

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[15] The fact that some physical conditions may fluctuate could not in any event support a wholesale exemption from Section 504 for *all* decisions relating to medical treatment, as the court of appeals appeared to hold. There is nothing "fluid" about the need of a child with Down's Syndrome for corrective esophagal surgery to enable him to receive nourishment. By the same token, programs and activities other than those that involve the furnishing of health services do not necessarily address only "static" situations, as the majority in *University Hospital* seemed to believe. For example, decisions that affect a handicapped child might be made every day in a federally assisted educational or physical rehabilitation program, and adjustments might have to be made in such a program to take into account fluctuations or developments in the child's physical or mental condition. The novel distinction advanced by the majority in *University Hospital* therefore has no logical (much less legal) basis, and its adoption would substantially undermine the effort to develop manageable standards in the administration and enforcement of Section 504. Cf. *Alexander* v. *Choate*, slip op. 10-11.

by reason of his handicap," been "denied the benefits of" and been "subjected to discrimination under" the federally assisted program. Thus, contrary to the court of appeals' view, the language of Section 504 firmly supports the regulations and interpretative guidelines respondents have challenged in this suit.

The guidelines also address the question of the hospital's responsibilities under Section 504 when the parents have refused to consent to medically beneficial treatment for their child. The Secretary determined when she promulgated the guidelines that most hospitals have established procedures to petition a court to order necessary medical care for a child if the parents do not consent and that health care professionals generally are required by state law to report cases of medical neglect to the appropriate state agency (49 Fed. Reg. 1631 (J.A. 43-44)). These special services and protections furnished to children who have been taken into a hospital's care under a federally assisted program are no less a part of that program than is the furnishing of the medical treatment itself. Accordingly, if the hospital refuses to take such protective measures on behalf of a handicapped infant, but would do so on behalf of a nonhandicapped child, the handicapped infant has, "solely by reason of his handicap," been "denied the benefits of" and been "subjected to discrimination under" the federally assisted program. The relevant guideline therefore states that such conduct would violate Section 504. See 45 C.F.R. Pt. 84, App. C para. (a)(4) (J.A. 122).

The court of appeals believed that to require a hospital to take these steps where the parents have withheld consent "would impose a particularly onerous affirmative action burden upon the hospital," and thereby contravene this Court's decision in *Davis* (see Pet. App. 39a). This conclusion was based on a misinterpretation of *Davis*, a misunderstanding of the Secretary's position, and a gross exaggeration of the burden involved. In *Davis*, the court held that Section 504 did not obligate the college to make "substantial modifications" in its nursing program to accommodate the needs of a deaf student (442 U.S. at 413). See *Alexander* v. *Choate*, slip op. 13 n.20. The relevant guideline at issue here, however, requires a hospital to initiate steps to override a parental with-

holding of consent to life-saving treatment for a handicapped child only if the hospital would do so for a nonhandicapped child. Thus, Section 504, as applied to handicapped infants in this context, requires a hospital to follow, not to modify, its existing policies. It imposes no new "affirmative action" obligation on a hospital within the meaning of *Davis*.

Nor can the requirement that the hospital take appropriate steps in such circumstances fairly be characterized as an "onerous" burden, especially when weighed against the consequences for the child. This much is demonstrated by the fact that hospitals commonly *do* take steps to assure treatment when, for example, religious convictions prohibit the parents from consenting to medical treatment or a necessary blood transfusion.[16] In fact, the hospital in the Bloomington Baby Doe case applied for such a court order. See note 1, *supra*. The hospital also might fulfill its obligation to afford evenhanded treatment to a handicapped child by notifying the state child protective services agency, which in turn could investigate the matter and seek any necessary court order. State law typically requires health care professionals to report cases of medical neglect,[17] and in Section 122(3) of the Child Abuse Amendments of 1984, Congress has now *required* the States, as a condition to receiving certain federal funds, to provide for prompt reporting by designated hospital officials of cases of suspected withholding of medically indicated treatment from disabled infants who have life-threatening conditions. See 50 Fed. Reg. 14888 (1985).

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[16] See, *e.g.*, *Jehovah's Witnesses in the State of Washington* v. *King County Hospital*, 278 F. Supp. 488 (W.D. Wash. 1967), aff'd, 390 U.S. 598 (1968); *Raleigh Fitkin-Paul Morgan Memorial Hospital* v. *Anderson*, 42 N.J. 421, 201 A.2d 537, cert. denied, 377 U.S. 985 (1964); *Application of Cicero*, 101 Misc. 2d 699, 421 N.Y.S.2d 965 (Sup. Ct. 1979); *In re Sampson*, 37 A.D.2d 668, 323 N.Y.S.2d 253 (Sup. Ct. 1971), aff'd, 29 N.Y.2d 900, 278 N.E.2d 918, 328 N.Y.S.2d 686 (1972).

[17] See Smith, *Life and Death Decisions in the Nursery: Standards and Procedures for Withholding Lifesaving Treatment from Infants*, 27 N.Y.L. Sch. L. Rev. 1125, 1183 n.255 (1982); Robertson, *Involuntary Euthanasia of Defective Newborns: A Legal Analysis*, 27 Stan. L. Rev. 213, 233-234 (1975).

B. THE LEGISLATIVE HISTORY AND CONSISTENT ADMINISTRATIVE CONSTRUCTION OF SECTION 504 STRONGLY SUPPORT THE PLAIN MEANING OF THE STATUTORY TEXT

As we have shown in Point A, the language of Section 504 clearly prohibits a federally assisted hospital program from denying a handicapped infant nourishment or medically beneficial treatment solely because of his handicap. "Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Commission* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). See also *CIA* v. *Sims*, No. 83-1075 (Apr. 16, 1985), slip op. 8-9. In this case, there is no indication whatever of a contrary legislative intention, much less one that is "clearly expressed."

In addition, Congress intended that the Secretary issue regulations implementing Section 504 and that she have "substantial leeway to explore areas in which discrimination against the handicapped posed particularly significant problems and to devise regulations to prohibit such discrimination." *Alexander* v. *Choate*, slip op. 16 n.24, citing S. Rep. 93-1297, *supra*, at 40-41, 56. See also *id.* at 19-20 & n.32; *Darrone*, slip op. 9-10 & nn.14-16; *Community Television* v. *Gottfried*, 459 U.S. 498, 511-512 (1983); *Davis*, 442 U.S. at 413. When Congress has entrusted the administration of a statute to an agency in this manner, a court "does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." *Chevron U.S.A. Inc.* v. *NRDC*, No. 82-1005 (June 25, 1984), slip op. 5. Instead, the question for the court is "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 4-5. At the very least, the Secretary's interpretation of Section 504 in the present context is a permissible one. Indeed, as we now demonstrate, there is firm support for that interpretation at every stage in the evolution of Section 504—from its origins in Title VI of the Civil Rights Act of 1964 through its enactment, the subsequent amendment of its operative terms, and its administrative implementation.

1. Title VI of the Civil Rights Act of 1964

Section 504 was modeled after Title VI of the Civil Rights Act of 1964, and in fact the nondiscrimination principle it embodies was originally proposed by Representative Vanik and Senators Humphrey and Percy as an amendment to Title VI. *Alexander* v. *Choate,* slip op. 5 n. 7, 7-8 & n.13. See note 10, *supra.* The backdrop of Title VI against which Congress acted therefore is the starting point in ascertaining the meaning of Section 504.

As this Court recognized in *Bakke,* one of the principal purposes of Title VI was to eliminate discrimination in federally assisted programs for the delivery of health services. Two of the separate opinions in *Bakke* quote the statement by Representative Celler, Chairman of the House Judiciary Committee and floor manager of the bill, that Title VI "would offer assurance that hospitals financed by Federal money would not deny adequate care to Negroes."110 Cong. Rec. 1519 (1964) (quoted in 438 U.S. at 285 (opinion of Powell, J.), and 438 U.S. at 330 (opinion of Brennan, White, Marshall, and Blackmun, J.J.)). Similarly, Senator Humphrey stated that "[d]iscriminatory treatment of patients is obviously a discrimination against beneficiaries of the Hill-Burton Act [42 U.S.C. (1958 ed.) 291 *et seq.*]," and he observed that Title VI could be enforced "by requiring that hospitals receiving Federal construction grants under the Hill-Burton Act agree not to exclude or segregate patients, or otherwise discriminate in their treatment of patients, because of race, color or national origin." 110 Cong. Rec. 6546 (1964).

Representative McCulloch and others stated that "example after example is available which establishes that Negroes are denied equal treatment under the [Hill-Burton] Act," with the result that "the health standards of Negroes and, thereby, the Nation are impaired" (H.R. Rep. 914, 88th Cong., 1st Sess. Pt. 2 at 24 (1963) (additional views of Reps. McCulloch, et al.)). And Representative Ryan stated: "The denial of the best available medical care because of a patient's color is inconsistent with the most basic democratic principles. By passing title VI Congress will make clear its intention that this practice cease." 110 Cong. Rec. 2482 (1964).

Supporters of Title VI also repeatedly cited the Fourth Circuit's then-recent decision in *Simkins* v. *Moses H. Cone Memorial Hospital*, 323 F.2d 959 (1963), cert. denied, 376 U.S. 938 (1964), which held that the refusal to admit black patients to hospitals that received Hill-Burton funds violated the Constitution, and they stated that Title VI embodied the same principle of nondiscrimination. See *Bakke*, 438 U.S. at 332-333 (opinion of Brennan, White, Marshall & Blackmun, J.J.) (quoting 110 Cong Rec. 6544 (1964) (remarks of Sen. Humphrey)).[18] Senator Humphrey and others deplored the effect that those practices had on the persons who were denied treatment, quoting the Fourth Circuit's observation in *Moses H. Cone* that "[r]acial discrimination in medical facilities is at least partly responsible for the fact that in North Carolina the rate of Negro infant mortality is twice the rate for whites and maternal deaths are five times greater."[19]

Consistent with this congressional intent, the regulations promulgated by the Department of Health, Education, and Welfare to effectuate Title VI provided that "[i]n grant programs which support the provision of health * * * services, discrimination in the selection or eligibility of individuals to receive the services, and segregation or other discriminatory practices in the manner of providing them, are prohibited." 45 C.F.R. 80.5(a) (1966). The regulations also made clear that hospitals applying for federal financial assistance would be required to give assurances of nondiscrimination with respect to "admission or other treatment of individuals as * * * patients" (45 C.F.R. 80.4(d)(2) (1966)). Against this background, it is beyond question that Title VI prohibits a hospital from denying nourishment or medical treatment to an infant because of his race.

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[18] See also 110 Cong. Rec. 2467, 2468 (1964) (Rep. Celler); *id.* at 2595 (Rep. Donohue); *id.* at 6050 (Sen. Javits); *id.* at 6543, 6546 (Sen. Humphrey); *id.* at 6561 (Sen. Kuchel); *id.* at 7054, 7055, 7062 (Sen. Pastore); *id.* at 7065 (Sen. Ribicoff).

[19] 323 F.2d at 970 n.23 (quoted at 110 Cong. Rec. 6543 (1964) (remarks of Sen. Humphrey)). See also 110 Cong. Rec. 2468 (Rep. Celler); *id.* at 7054, 7055 (Sen. Pastore).

2. The Enactment of Section 504 in 1973

It was on the foundation of Title VI, just discussed, that Congress enacted Section 504 in 1973. When Congress incorporates the terms of a prior law into a later statute, it is presumed to know the scope, purposes, and administrative interpretation of the prior law and to intend that they be followed under the later enactment. *Cannon* v. *University of Chicago*, 441 U.S. 677, 694-698 (1979); *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978). Congress therefore must be presumed to have been aware in 1973 that one of the principal applications of Title VI was in the area of health services and that HEW's Title VI regulations prohibited a hospital from discriminating in the admission and treatment of patients and the selection of persons to receive services. Absent a contrary indication, it is reasonable to infer that Congress intended Section 504 to have a similar scope. That inference is all the more warranted because Senator Humphrey was a principal sponsor of both Section 504 and Title VI. Further, because handicapped persons often have a special need for medical care, it would be contrary to the entire thrust of the Rehabilitation Act to construe Section 504 to be inapplicable to the denial of necessary medical treatment solely because of an individual's handicap. Cf. *Darrone*, slip op. 7 n.12. Nothing in the legislative history suggests that Congress intended that anomalous result.

The Committee Reports on the various versions of the bill describe Section 504 only briefly and in general terms that in many instances merely paraphrase the statutory language.[20] Certainly nothing in these passages undermines the interpretation of Section 504 reflected in the guidelines promulgated by the Secretary in 1984. Because there were no substantial floor debates on Section 504 in 1973, the Court has concluded that "the intent with which Congressman Vanik and Senator Humphrey crafted the predecessor to § 504 is a

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[20] See S. Rep. 92-1135, 92d Cong., 2d Sess. 49, 77 (1972); H.R. Conf. Rep. 92-1581, 92d Cong., 2d Sess. 78 (1972); S. Rep. 93-48, 93d Cong., 1st Sess. 18, 53, 80 (1973); H.R. Rep. 93-42, 93d Cong., 1st Sess. 42 (1973); S. Rep. 93-318, 93d Cong., 1st Sess. 18, 50, 70 (1973); H.R. Rep. 93-244, 93d Cong., 1st Sess. 35 (1973).

primary signpost on the road toward interpreting the legislative history of § 504." *Alexander* v. *Choate,* slip op. 8 n.13. The tenor of their remarks strongly supports the Secretary's interpretation of Section 504 to prohibit a hospital from denying a handicapped child, solely because of his handicap, the medical treatment necessary to address a life-threatening condition.

Senator Humphrey described the predecessor bill broadly (118 Cong. 525-526 (1972) (emphasis added)):

> I am insisting that the civil rights of 40 million Americans now be affirmed and effectively guaranteed by Congress—our several million disabled war veterans, the 22 million people with a severe physically disabling condition, the one in every 10 Americans who has a mental condition requiring psychiatric treatment, the 6 million persons who are mentally retarded, the hundreds of thousands crippled by accidents and the destructive forces of poverty, *and the 100,000 babies born with defects each year.*
>
> *These people have the right to live,* to work to the best of their ability—to know the dignity to which every human being is entitled* * *.
>
> * * * *Every child*—gifted, normal, and handicapped—*has* a fundamental right to educational opportunity and *the right to health* * * *.

And Senator Humphrey later stated that the bill "responded to an awakening public interest in millions of handicapped children, youth, and adults who suffer the profound indignity and despair of isolation, discrimination, and maltreatment." *Id.* at 9495. Represenatative Vanik explained the bill in terms that likewise manifest a concern for the treatment of handicapped children.[21]

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[21] See 117 Cong. Rec. 45974 (1971) (emphasis added):

> I am today introducing legislation to provide equal treatment of the handicapped in all programs which receive Federal assistance.
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> * * * * *
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> The number of handicapped is growing daily. *Every year 100,000 babies are born with defects* that will force them to use crutches, braces, or wheelchairs for all of their lives.

3. The 1974 Amendament of the Definition of the Term "Handicapped Individual"

a. In 1974, Congress amended the definition of the term "handicapped individual" as used in Section 504 in order to assure that Section 504 would have a broad scope. As originally enacted in 1973, that definition referred to a handicap as a disability that hinders employment and can reasonably be expected to benefit from vocational rehabilitation services.[22] Congress concluded in 1974 that although this definition was appropriate for determining an individual's eligibility for vocational rehabilitation services under the Act, it was not apt for defining the coverage of Section 504, which was intended to prohibit discrimination against handicapped persons in all federally assisted programs, not merely those concerned with vocational rehabilitation. S. Rep. 93-1297, *supra*, at 37-38. Accordingly, Congress enacted a separate provision applicable to Section 504 that defines a handicapped individual as a person who has a physical or mental impairment that substantially limits one or more of his major life activities, or who has a record of or is regarded

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> The masses of the handicapped live and struggle among us, often shunted aside, hidden and ignored. How have we as a nation treated these fellow citizens?
>
> In this country we still have the snakepit mental institutions – institutions for confinement without treatment, where brutality and unexplained deaths are common * * *.

See also 119 Cong. Rec. 7114 (1973). Subsequently, in remarks immediately before the Rehabilitation Act passed the House in 1973, Representative Vanik expressed gratification that his antidiscrimination provision had been included in the bill. But he decried the deletion of certain programs that had been intended to aid handicapped children, and he did so in terms that touch on the question presented in this case (119 Cong. Rec. 18137 (1973)):

> In ancient Greece, in the city-state of Sparta, the people would take the handicapped newborn, and leave them to die of exposure on the mountainside. Are we guilty of the same type of gross neglect in this country?

See also *id.* at 24586 (Senator Taft) ("the most disgraceful barrier of all—discrimination").

[22] See Section 7 (6) of the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 361, now codified at 29 U.S.C. 706(7)(A).

as having such an impairment. See pages 18-19, *supra*.[23] In a number of respects, the legislative history of this amendment supports the Secretary's interpretation of Section 504 in the present setting.

First, the Senate Report emphasizes that Section 504 "constitutes the establishment of a *broad government policy* that programs receiving Federal financial assistance shall be operated without discrimination on the basis of handicap" (S. Rep. 93-1297, *supra*, at 39 (emphasis added)). Second, and in a related vein, the report states that "Section 504 was enacted to prevent discrimination against *all* handicapped individuals * * * in relation to Federal assistance in employment, housing, transportation, education, *health services*, or any other Federally-aided programs." *Id.* at 38 (emphasis added). The exception the court of appeals carved out of Section 504 for medical treatment decisions affecting handicapped infants is inconsistent with these statements of congressional intent to take an all-inclusive approach.[24]

Third, the Senate Report reiterates that Section 504 "was patterned after" Title VI of the Civil Rights Act of 1964 (S. Rep. 93-1297, *supra*, at 39) and that discrimination on the basis of handicap "is similar to discrimination because of race" (*id.* at 38). As Judge Winter explained in his dissenting opinion in *University Hospital*, Congress thereby determined that, "so far as the administration of federal financial assistance is concerned, discrimination on the basis of a hand-

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[23] Rehabilitation Act Amendments of 1974, § 111(a), Pub. L. No. 93-516, 88 Stat. 1619, codified at 29 U.S.C. 706(7)(B).

[24] This Court consistently has relied on the Senate Report on the 1974 Amendments as an authoritative exposition of the congressional intent underlying Section 504. See *Davis*, 442 U.S. at 406 n.6; *Gottfried*, 459 U.S. at 509; *Darrone*, slip op. 10 n. 15; *Alexander* v. *Choate*, slip op. 5 n.7, 16 n.24, 18-19 & n.27. There was no House Report on the bill. An identical bill (H.R. 14225, 93d Cong., 2d Sess.) previously had passed the House and Senate and had been subjected to a pocket veto by the President on October 29, 1974. See S. Rep. 93-1297, *supra*, at 1-2. The Conference Report on that earlier bill contains a discussion of the amendments to the term "handicapped individual" (see S. Conf. Rep. 93-1270, 93d Cong., 2d Sess. 25-28 (1974)) that is virtually identical to that in S. Rep. 93-1297, and the discussion in the latter report therefore can be viewed as expressing the view of both Houses.

icap should be on statutory par with discrimination on the basis of race" (Pet. App. 43a-44a).[25] Accordingly, as Judge Winter concluded, just as "[a] judgment not to perform certain surgery because a person is black is not a *bona fide* medical judgment" and is prohibited by Title VI, "[s]o, too, a decision not to correct a life threatening digestive problem because an infant has Down's Syndrome is not a *bona fide* medical judgment" and is prohibited by Section 504 (Pet. App. 44a). See also 48 Fed. Reg. 30847 (1983).

Finally, the Senate Report makes clear that although Section 504 as originally enacted did not specifically require the issuance of regulations or provide for enforcement procedures, "it is clearly mandatory in form, and such regulations and enforcement are intended" (S. Rep. 93-1297, *supra*, at 39-40). The Report states in this regard that HEW had "experience in dealing with handicapped persons and with the elimination of discrimination in other areas," and that HEW therefore should assume the lead role in implementing Section 504 (*id.* at 40). Congress's acknowledgment of HEW's expertise and its intent that HEW promulgate regulations to effectuate the broad policy of Section 504 require that particular deference be given to the product of the Secretary's deliberations. *Alexander* v. *Choate*, slip op. 16 & n.24; *Darrone*, slip op. 10 & n.15.[26]

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[25] In *Alexander* v. *Choate*, the Court observed that "too facile an assimilation of Title VI law to § 504 must be resisted" (slip op. 5 n.7). But that observation was made in connection with the question whether Section 504 itself forbids conduct that has the *effect* of discriminating, even though Title VI itself does not. See *Guardians Association* v. *Civil Service Commission*, 463 U.S. 582 (1983). The regulations and guidelines at issue in this case, by contrast, address instances of *intentional* discrimination: the withholding of medical treatment from an infant "because of," not "in spite of" or without regard to, his handicap. *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 279 (1979).

[26] Another aspect of the 1974 Amendments also supports the Secretary's interpretation. Title III of those Amendments, 88 Stat. 1631 *et seq.*, provided for the President to call a White House Conference on Handicapped Individuals. Congress directed the Conference to consider, inter alia, ways of "provid[ing] * * * health and diagnostic services for all children early in life so that handicapping conditions may be discovered and treated."

b. An additional backdrop for the 1974 amendments further supports the Secretary's interpretation of Section 504, for in that same year Congress reenacted and expanded the coverage of another statute that specifically prohibits discrimination in admissions and treatment by federally assisted hospitals. As we explain below (see pages 41-43, *infra*), this provision has a direct nexus to Section 504.

The statutory provision involved had been enacted in 1970,[27] and it stated in relevant part (42 U.S.C. (1970 ed.) 4581(a)):

> Alcohol abusers an[d] alcoholics shall be admitted to and treated in private and public general hospitals, which receive Federal funds for alcoholic treatment programs, on the basis of medical need and shall not be discriminated against solely because of their alcoholism.

This statute directly parallels the Secretary's interpretation of Section 504, which likewise requires that treatment decisions be made on the basis of medical need and that the protected individuals not be discriminated against solely because of their handicap.[28] Thus, even prior to the enactment of Sec-

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§ 302(d)(1), 88 Stat. 1632. The Senate Report explains Congress's concern in terms that bear on this case (S. Rep. 93-1297, *supra*, at 50):

> It is against the basic tenets of the scientific process to make an assumption of no hope and no help. No less should be true of public policy. In the case of individuals with handicaps, making this assumption all too often has resulted in the violation of their basic rights as human beings, and has condemned them to live useless lives. Foresight and a strong commitment to the worth and dignity of the human life could have allowed them to live their lives with respect and dignity as first class citizens.

The Report also states (*id.* at 56) that the Conference should make recommendations "on how to change programs in health * * * to ensure that individuals with severe and multiple handicaps will have their needs met." Congress's concurrent efforts to advance health care to benefit handicapped children and to prevent discrimination against handicapped persons converge in the instant case. See *Grove City*, slip op. 7.

[27] Pub. L. No. 91-616, § 321(a), 84 Stat. 1852.

[28] An Assistant Secretary of HEW expressed the Department's support for the alcoholism provision in terms that apply equally to Section 504:

> *Federal policy which prohibits discrimination on the basis of diagnosis is valid and justifiable.* It is our opinion that alcoholics should be admitted to medical care facilities on an equal basis as persons who suffer other illnesses and that alcoholics should not be refused admission on the basis of their alcoholism. We fully agree that hospitals should admit and treat alcoholics on the basis of medical needs.

tion 504 in 1973, Congress had prohibited federally funded hospitals from discriminating on the basis of one type of handicap—alcoholism (see pages 41, 42-43, *infra*)—in the furnishing of medical treatment.[29]

In 1974, Congress reworded and expanded this provision to prohibit discrimination on the basis of alcoholism by all hospitals that receive *any* form of federal financial assistance, not only funds for alcohol treatment programs.[30] Respondent American Hospital Association (AHA) opposed this provision in terms that are essentially identical to respondents' submission in this case. Thus, the AHA expressed the view that "the admission of patients to a hospital and the treatment of patients in a hospital are matters for professional decision on the basis of medical need" and that "priority for admission of patients to a hospital should not be dictated by laws but by the medical needs of the patients."[31] Congress,

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Alcoholic Abuse and Alcoholism Prevention, Treatment, and Rehabilitation: Hearings on S. 3835 Before the Special Subcomm. on Alcoholism and Narcotics of the Senate Comm. on Labor and Public Welfare, 91st Cong., 2d Sess. 146 (1970) (emphasis added). See also *id.* at 65, 76-77, 90, 104-105, 114, 175; H.R. Rep. 91-1663, 91st Cong., 2d Sess. 12 (1970).

[29] In 1972, Congress enacted a similar statute providing that drug abusers who are suffering from "emergency medical conditions" "shall not be refused admission or treatment, solely because of their drug abuse or drug dependence," by any federally assisted general hospital. Pub. L. No. 92-255, § 407, 86 Stat. 78. In 1976, Congress amended this statute to delete the requirement that the drug abuser have an "emergency" condition and to provide that such persons may not be "discriminated against in admission or treatment," rather than "refused" admission or treatment. Pub. L. No. 94-237, § 6(a), 90 Stat. 244. This provision is now codified at 42 U.S.C. (Supp. I) 290ee-2.

[30] Pub. L. No. 93-282, § 121(a), 88 Stat. 130. As amended in 1974, the section provided (42 U.S.C. (1970 ed. Supp. IV 1974) 4581(a)):

> Alcohol abusers and alcoholics who are suffering from medical conditions shall not be discriminated against in admission or treatment, solely because of their alcohol abuse or alcoholism, by any private or public general hospital which receives support in any form from any program supported in whole or in part by funds appropriated to any Federal department or agency.

This provision was further amended in 1976 to apply to federally assisted outpatient facilities as well. Pub. L. No. 94-371, § 11(a), 90 Stat. 1041. As so amended, the provision is now codified at 42 U.S.C. (Supp. I) 290dd-2(a).

[31] See *Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act Amendments, 1973: Hearings on S. 1125*

however, rejected the AHA's position that federal law has no role in preventing discrimination in the furnishing of medical treatment. The Senate Committee noted that the AHA's own policy statement, adopted in 1969, took the position that "[f]ailure to admit alcoholics and patients with other drug problems denies them the benefits that would be available in cases of poisoning due to other causes" and that "[d]ecisions concerning admission of these persons should be based only on the needs of the individual." S. Rep. 93-208, 93d Cong., 1st Sess. 14 (1973). The Committee further explained that, contrary to the AHA's view, the statutory provision "does not dictate the admission of patients to hospitals. It provides that alcoholics not be discriminated against in admission or treatment policies of the general hospitals." *Id.* at 14.[32] This is the same principle that the Secretary has applied in interpreting Section 504 as applied to a hospital's discrimination against handicapped infants on the basis of their handicaps.

4. HEW's Promulgation of the Section 504 Regulations in 1977

a. Consistent with Congress's intent, HEW published regulations to implement Section 504 on May 4, 1977. See 42 Fed. Reg. 22677. Those regulations contain a subpart that specifically applies to federally assisted health services programs, along with social service and welfare programs. See 45 C.F.R. Pt. 84, Subpt. F. They state, inter alia, that in providing health "services or benefits" under such a program, the recipient may not, solely on the basis of handicap, "[d]eny a qualified handicapped person these benefits or services," or "[a]fford a qualified handicapped person an opportunity to

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Before the Subcomm. on Alcoholism and Narcotics of the Senate Comm. on Labor and Public Welfare, 93d Cong., 1st Sess. 303 (1973). The AHA unsuccessfully opposed the nondiscrimination provision on similar grounds in 1970. See *1970 Hearings*, *supra* note 28, at 176.

[32] The Senate Report quoted in the text was prepared by the Senate Committee on Labor and Public Welfare, the same Committee that had jurisdiction over the Rehabilitation Act of 1973, and the Report was issued on June 13, 1973, only one month before that Committee issued its report on the Senate version of the bill that became the Rehabilitation Act of 1973. See S. Rep. 93-318, 93d Cong., 1st Sess. (1973).

receive benefits or services that is not equal to that offered nonhandicapped persons." 45 C.F.R. 84.52(a)(1)-(2). However, the regulations, like Section 504 itself, do not require that the benefits or services afforded handicapped persons produce the identical result or level of achievement as they do for a nonhandicapped person. 45 C.F.R. 84.4(b)(2). See *Alexander* v. *Choate*, slip op. 16. They require only "evenhanded treatment." *Ibid.*; *Davis*, 442 U.S. at 410. With regard to medical treatment decisions, an explanatory note states (45 C.F.R. Pt. 84, App. A para. 36 (emphasis added)):

> [A] burn treatment center need not provide other types of medical treatment to handicapped persons unless it provides such medical services to nonhandicapped persons. *It could not, however, refuse to treat the burns of a deaf person because of his or her deafness.*

These provisions of the 1977 regulations thus make clear that Section 504 prohibits the denial of medically needed treatment based solely on the individual's handicap. There is no basis for excluding handicapped infants from their coverage.[33]

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[33] The court of appeals erred in stating that the Secretary had disclaimed any authority with respect to decisions concerning medically indicated treatment of handicapped infants when the present Section 504 regulations were proposed in 1976, and in discounting the Secretary's interpretation on that ground (see Pet. App. 18a-19a, 25a). All that the Secretary determined in 1976 was that Section 504 did not authorize regulations "concerning adequate and appropriate psychiatric care or safe and humane living conditions for persons institutionalized because of handicap or concerning payment of fair compensation to patients who perform work." 41 Fed. Reg. 29548, 29559 (1976). In other words, Section 504 was not understood to confer on institutionalized persons a per se right to safe conditions or to treatment. Compare *Youngberg* v. *Romeo*, 457 U.S. 307 (1982). This conclusion of course was consistent with the fact that, as relevant here, Section 504 is essentially concerned only with discrimination in the *relative* treatment of handicapped and nonhandicapped persons and does not confer any *absolute* right to receive particular services or benefits under federally assisted programs. Moreover, when the Secretary promulgated the instant regulations in 1984, she distinguished the Department's comments during the rulemaking proceedings in 1976 on the ground that they addressed this distinct question of an institutionalized person's right to treatment. 49 Fed. Reg. 1636 (J.A. 60). The Department's interpretation of its own prior regulatory action is entitled to particular deference. *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965).

b. The regulations promulgated by the Secretary in 1977 also specifically address the subject of furnishing medical treatment to alcoholics and drug addicts in a way that bears on this case. First, on a question that had generated much controversy, the Secretary concluded that alcoholism and drug addiction are "physical or mental impairments" within the meaning of 29 U.S.C. 706(7) and that alcoholics and drug addicts therefore are "handicapped individuals" within the meaning of Section 504 if their impairments substantially limit their major life activities. 45 C.F.R. Pt. 84, App. A para. 4. The Secretary expressly concurred in the opinion of the Attorney General on this question (*ibid.*), which stated (43 Op. Att'y Gen. No. 12 (Apr. 12, 1977), at 10 (emphasis added)):

> The congressional purpose expressed in [S. Rep. 93-1297, *supra*, at 38] to prevent discrimination on the basis of an essentially irrelevant criterion would appear to apply where the handicap involved is alcoholism or drug addiction as it does to other diseases. For example, *Congress could reasonably have concluded that an alcoholic or drug addict not be denied treatment in a federally-assisted hospital for a serious injury solely because he was an alcoholic or drug addict, as long as he "otherwise qualified" for such treatment.*

This formal opinion of the Attorney General thus directly supports the Secretary's interpretation that Section 504 prohibits discrimination on the basis of handicap in the furnishing of health services and the Secretary's understanding of the significance of the term "otherwise qualified" in this setting.

Second, the 1977 regulations specifically provide that a general hospital or outpatient clinic that receives federal financial assistance "may not discriminate in admission or treatment against a drug or alcohol abuser or alcoholic who is suffering from a medical condition, because of the person's drug or alcohol abuse or alcoholism." 45 C.F.R. 84.53. In an explanatory analysis, the Secretary stated that this provision was included pursuant to the special statutory provisions prohibiting discrimination against alcoholics and drug abusers,

discussed above. See pages 37-39 and note 29, *supra*. But the Secretary continued: "Section 504 itself also prohibits such discriminatory treatment and, in addition, prohibits similar discriminatory treatment by other types of health providers." 45 C.F.R. Pt. 84, App. A para. 37. These provisions again confirm that the application of Section 504 to medical treatment decisions was firmly established in the administrative framework when Congress next turned its attention to Section 504.

5. The 1978 Amendments to the Rehabilitation Act

In 1978, Congress amended the Rehabilitation Act in several respects that again are relevant to the issue in this case. Pub. L. No. 95-602, 92 Stat. 2955 *et seq*. First, Congress added Section 505(a)(2) to the Act (92 Stat. 2983) to provide that the "remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964" shall be available to any person aggrieved by a violation of Section 504. 29 U.S.C. 794a(a)(2). The Senate Report stresses the "parallel relationship between section 504 and title VI" (S. Rep. 95-890, 95th Cong., 2d Sess. 19 (1978)), lending further force to the parallel upon which the Secretary relied. The Report also states that HEW's regulations "with respect to procedures, remedies, and rights under Section 504 conform with those promulgated under Title VI. Thus, this amendment codifies existing practice as a specific statutory requirement." *Ibid.* The Court has understood this action by Congress in 1978 to constitute a general endorsement of HEW's Section 504 regulations. *Alexander* v. *Choate*, slip op. 16 n.24; *Darrone*, slip op. 10 & nn. 15, 16.

Moreover, in response to specific concerns in the employment context regarding the interpretation by the Secretary and the Attorney General that the term "handicapped individual" includes alcoholics and drug addicts, Congress amended the definition of that term for purposes of Section 504 to exclude from coverage, in the employment context, any person whose current use of alcohol or drugs prevent him from performing the duties of the job or would constitute a direct threat to property or the safety of others. 29 U.S.C. 706(7)(B). However, Congress at the same time ratified the Secretary's coverage of alcoholics and drug abusers under

other programs. See H.R. Rep. 95-1149, 95th Cong., 2d Sess. 22-23 (1978); H.R. Conf. Rep. 95-1780, 95th Cong., 2d Sess. 102 (1978). The debates establish that Congress was fully aware of the circumstances of the Secretary's interpretation that alcoholics and drug addicts are covered, and portions of the Attorney General's opinion were quoted with approval on that question. 124 Cong. Rec. 30322-30325, 37509-37510 (1978). As we have pointed out (see page 41, *supra*), the Attorney General's opinion had specifically concluded that a federally assisted hospital is prohibited by Section 504 from denying treatment because of a person's handicap—in that case, alcoholism or drug addiction. Moreover, Senator Williams stated that he preferred the Senate bill to the House bill, which would have excluded alcoholics and drug addicts from the protection of Section 504 in "health" and other programs. *Id.* at 30323. And Senator Hathaway observed that the provisions of the comprehensive alcohol and drug abuse statutes already prevented discrimination against alcoholics and drug addicts "in hospital and outpatient services," and he stated that Section 504 also barred such discrimination at federally-assisted hospitals under the Medicare and Medicaid Programs. *Id.* at 30325.

It thus is clear that Congress in 1978 did not view the application of Section 504 to prohibit a federally assisted health care provider from refusing to furnish medical treatment solely because of the patient's handicap as an unwarranted or unprecedented extension of federal authority, as the court of appeals seemed to believe. Rather, Congress, like the Secretary, viewed Section 504 as consistent in this respect with the narrower statutes applicable to alcoholics and drug abusers, which themselves manifested a rejection by Congress of the proposition advanced by respondent AHA that federal law should play no role in assuring nondiscriminatory treatment. Nothing in the 1978 amendments suggests that Congress intended to exclude handicapped infants from this broader protection that Congress affirmed under Section 504. To the contrary, in another provision added by the 1978 Act, Congress once again exhibited a special concern for handicapped children under the Rehabilitation Act by establishing a special program for young children, principally

those up to the age of three, who were "severely handicapped."[34]

6. The Promulgation of the 1984 Regulations and Interpretative Guidelines

In 1984, when the Secretary promulgated the regulations and interpretative guidelines at issue in this case, she made clear that they did not for the first time establish the application of Section 504 to the withholding of medical treatment from handicapped infants. That application, she explained, was already established by Section 504 itself and by the comprehensive implementing regulations promulgated in 1977. 49 Fed. Reg. 1628 (J.A. 34). And, indeed, in May 1980, HHS formally resolved a Section 504 complaint against a hospital arising out of the death of an infant with Down's Syndrome who also had an intestinal blockage.[35] As we have shown, this interpretation of Section 504 is compelled by its plain language and is firmly supported by the circumstances of each stage in its statutory and administrative evolution.

After the regulations and interpretative guidelines were adopted in January 1984, Congress enacted the Child Abuse Amendments of 1984. Those amendments, like the Section 504 regulations, seek to encourage the establishment of Infant Care Review Committees in hospitals by directing the Secretary to develop a model for such a Committee, and they require state child protective services agencies, as a condition to receiving federal funds, to have procedures for receiving and responding to reports of the withholding of medical treatment from handicapped infants. See notes 4 and 5, *supra*. In this way, Congress has built upon and put into

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[34] The new provision, 29 U.S.C. 762(11), authorizes a medical research and demonstration project to develop innovative ways to furnish diagnosis, infant stimulation, therapy, counseling and other services to such children and their parents.

[35] In the compliance agreement, the hospital committed itself to report to the state child protective services agency any cases involving a lack of parental consent to medically indicated treatment for handicapped infants in the same manner as it reported similar cases involving nonhandicapped children. See 48 Fed. Reg. 30847-30848 (1983).

statutory form two important features of the Secretary's administrative efforts under Section 504.

However, the 1984 Amendments, which principally concern the funding of state child protective services agencies, do not impose a direct obligation on the hospitals themselves not to withhold medical treatment from handicapped infants solely because of their handicaps.[36] That is the province of Section 504. The application of Section 504 to the hospitals serves to fill out the shared responsibility of the federal government, the States, and federally assisted hospitals in addressing this problem, which Congress, in enacting the 1984 Amendments, determined to be one of substantial national importance and concern. As the Secretary explained when she promulgated the regulations and interpretative guidelines under Section 504 in 1984, the existence of review mechanisms within the hospitals and state agencies may well make direct federal involvement unneccessary in most cases. But Section 504 affords essential protection as regards the responsibilities of federally assisted hospitals under this arrangement. The Federal Government pays approximately one-third of the total budget of the Nation's hospitals—almost $48 billion in 1982 alone. 49 Fed. Reg. 1639 (J.A. 72). There is nothing unfair or intrusive about a provision of

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[36] The 1984 Amendments did not by statute resolve the question of the application of Section 504 in this setting. Section 127(a) of the Amendments (98 Stat. 1754) states that nothing in them "is intended to affect any right or protection under section 504." Sponsors of compromise language in the substantive provisions of the 1984 Amendments viewed this language in Section 127(a) as embodying a "policy of neutrality" on the question of the application of Section 504. 130 Cong. Rec. S12392 (daily ed. Sept. 28, 1984). Nevertheless, as we have explained more fully in our Reply Brief at the petition stage (at 8-9 & n.4), there were numerous passages in the committee reports and debates on the 1984 Amendments stating that the withholding of medical care from handicapped infants because of their handicap is a form of discrimination, endorsing the application of Section 504 in this setting, and expressing the view that the bill would build upon the Secretary's enforcement efforts under Section 504. See H.R. Rep. 98-159, 98th Cong., 1st Sess. 3 (1983); S. Rep. 98-246, 98th Cong., 1st Sess. 5-11 (1983); 130 Cong. Rec. H379, H380 (daily ed. Feb. 2, 1984) (remarks of Rep. Murphy); *id.* at H381, H382, H384, H385 (remarks of Rep. Erlenborn); *id.* at H388 (remarks of Rep. Biaggi); *id.* at H393 (remarks of Rep. Chandler); *id.* at H395 (remarks of Rep. Hyde); *id.* at H396, H400 (remarks of Rep. Miller); *id.* at H397 (remarks of Rep. Quillen).

federal law that requires the hospital programs receiving these funds to refrain from discriminating on the basis of handicap in furnishing benefits and services.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

STATUTORY PROVISIONS INVOLVED

1. Section 504 of the Rehabilitation Act of 1973, as codified at 29 U.S.C. 794, provides:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of the title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

2. Section 7(7)(B) of the Act, 29 U.S.C. 706(7)(B) provides:

> Subject to the second sentence of this subparagraph, the term "handicapped individual" means, for purposes of subchapters IV and V of this chapter, any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such an impairment, or (iii) is regarded as having such an impairment. For proposes of sections 793 and 794 of this title as such sections relate to employment, such term does not include any individual who is an alcoholic or drug abuser whose current use of alcohol or drugs prevents such individual from performing the duties of the job in question or whose employment, by reason of such current alcohol or drug abuse, would constitute a direct threat to property or the safety of others.

3. Section 505(a)(2) of the Act, as codified at 29 U.S.C. 794a(a)(2) (brackets in original), provides:

> The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.